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UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ROBERT LUM,)	CIV. NO. 07-00589 SOM/LEK
)	CR. NO. 03-00560-01 SOM
Petitioner,)	GOVERNMENT'S REPLY TO
vs.)	PETITIONER ROBERT LUM'S
UNITED STATES OF AMERICA,)	(28 U.S.C. § 2255) PETITION
)	TO VACATE HIS CONVICTION/
Respondent.)	SENTENCE; EXHIBITS "A" - "B";
)	CERTIFICATE OF SERVICE
)	
)	

GOVERNMENT'S REPLY TO PETITIONER ROBERT LUM'S
(28 U.S.C. § 2255) PETITION TO VACATE HIS CONVICTION/SENTENCE

A. INTRODUCTION

This pleading replies to the Pro Se 28 U.S.C. § 2255 Petition filed by convicted Defendant ROBERT LUM on December 4,

2007. LUM's Petition seeks to set aside his conviction by plea in the above-referenced criminal case.

B. BACKGROUND

On November 18, 2004, Defendant LUM pled guilty before federal Magistrate Judge Barry M. Kurren to the single count Indictment charging him (and 11 other individuals) with participating in a methamphetamine trafficking conspiracy in violation of 21 U.S.C. §§ 841(a)(1) and 846. Approximately ten months later, LUM sought to withdraw his guilty plea. After an evidentiary hearing before Hawaii District Judge Susan Oki Mollway on November 3, 2005, LUM's motion to withdraw his guilty plea was denied.

Sentencing proceedings were held before Judge Mollway on November 28, 2005. Because the sentencing record established that LUM had previously been convicted of a drug trafficking felony, Judge Mollway imposed the statutorily required 20-year mandatory minimum prison term.

LUM directly appealed Judge Mollway's Order Denying his Motion to Withdraw His Guilty Plea to the Ninth Circuit. A panel of the Ninth Circuit affirmed LUM's conviction in a Memorandum Opinion filed November 28, 2006.

C. ANALYSIS OF LUM'S PETITION

As best undersigned Government counsel can discern, LUM's present § 2255 Petition does not raise any new issues

beyond the issues already decided adversely to LUM at the evidentiary plea withdrawal hearing before Judge Mollway on November 3, 2005. LUM appears to claim in his present Petition (1) that the attorney who represented him at his guilty plea (Emmett Lee Loy, Esq.) provided ineffective assistance of counsel at such plea, and, (2) that the Rule 11 plea colloquy conducted by Magistrate Judge Kurren was flawed.¹

Our position is that LUM's present claim(s) should be summarily dismissed, because the issues which he now raises were necessarily previously litigated adversely to LUM before Judge Mollway, and, affirmed on direct appeal. The validity of LUM's guilty plea was squarely before Judge Mollway at the November 2005 plea withdrawal hearing. LUM's former attorney, Mr. Lee Loy, as well as predecessor defense counsel Clayton Kimoto, each testified at this hearing concerning the circumstances surrounding LUM's guilty plea. The transcript of the guilty plea colloquy before Judge Kurren was also a part of the evidence at the plea withdrawal hearing.²

¹ LUM also makes a cryptic claim that (co-conspirator) "Donald Morton and the FBI provided false information" concerning his arrest (Petition at 4). However, this conclusory claim is not comprehensible on the facts of LUM's case, since LUM's arrest was the result of evidence derived from a court ordered wiretap, independent of any "sting."

² A copy of the Rule 11 transcript is annexed to the Government's (supplemental) pleading filed October 19, 2005, opposing LUM's plea-withdrawal motion.

After considering all of the evidence presented at the plea withdrawal hearing (including LUM's own testimony), Judge Mollway found that LUM failed to meet his burden to demonstrate a fair and just reason why he should be allowed to withdraw his guilty plea. In upholding LUM's guilty plea, Judge Mollway necessarily considered, and upheld, the sufficiency of LUM's Rule 11 colloquy before Magistrate Judge Kurren. Likewise, the Court also found that Mr. Lee Loy did not provide ineffective assistance of counsel in connection with LUM's guilty plea. Judge Mollway expressly found that in testifying at the plea-withdrawal hearing, LUM had "embellished" his story upon cross examination to a degree which rendered his testimony not believable.

LUM's present Petition, just like his Motion to Withdraw His Guilty Plea, is plainly a desperate attempt by LUM to escape from the consequences of the enhanced statutory minimum which applies to his case by reason of his prior felony drug trafficking conviction. Unfortunately for LUM, despite his apparent good faith efforts, he was not able to provide "substantial assistance" which merited a sentencing departure motion (see Exhibit "A" at pp. 4, 9-10). LUM's § 2255 Petition is thus wholly devoid of merit, and should be summarily dismissed.

For the convenience of the Court, we have annexed as Exhibit "A" hereto a copy of our Appellate Brief (dated April 27, 2006) answering LUM's direct appeal. This brief provides a chronological summary of the prior proceedings in this case, and includes a detailed recitation of the proceedings before Judge Mollway in November 2005 at LUM's plea withdrawal hearing (see Exhibit "A" at pp. 5-8). We particularly direct the Court's attention to Judge Mollway's credibility and factual findings, excerpts of which are reproduced at pages 14-16 of Exhibit "A".

Annexed hereto as Exhibit "B" is a copy of the Ninth Circuit Memorandum Opinion filed November 28, 2006, affirming Judge Mollway's denial of LUM's Motion to Withdraw His Guilty Plea.

D. CONCLUSION

For the reasons stated above, LUM's present § 2255 Petition should be summarily dismissed.

DATED: December 31, 2007, at Honolulu, Hawaii.

Respectfully submitted,

EDWARD H. KUBO, JR.
United States Attorney
District of Hawaii

By /s/ Louis A. Bracco
LOUIS A. BRACCO
Assistant U.S. Attorney

Attorney for Plaintiff
UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served upon the following person by depositing said copy in the United States mail, postage prepaid, as set forth below:

ROBERT LUM
Register No. 95160-022
Federal Correctional Institute
P.O. BOX 5000
Sheridan, OR 97378

PRO SE

DATED: December 31, 2007, at Honolulu, Hawaii.

/s/ Shelli Ann H. Mizukami